

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

IRVING FELDBAUM, Derivatively on Behalf)	
of POWERSECURE INTERNATIONAL, INC.)	
)	
Plaintiff,)	Case No.: 5:14-cv-464-D
)	
v.)	
)	
SIDNEY HINTON, CHRISTOPHER T.)	
HUTTER, W. KENT GEER, THOMAS J.)	
MADDEN III, KEVIN P. COLLINS, JOHN A.)	
MILLER, and A. DALE JENKINS,)	
)	
Defendants,)	
)	
-and-)	
)	
POWERSECURE INTERNATIONAL, INC.,)	
a Delaware corporation,)	
)	
Nominal Defendant.)	
)	
)	

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

All parties that have appeared in this action, by and through their undersigned counsel, hereby stipulate and agree as follows:

WHEREAS, on May 9, 2016, nominal defendant PowerSecure International, Inc. (“PowerSecure” or the “Company”), a Delaware corporation, was acquired by Southern Company in an all cash transaction, becoming a wholly owned subsidiary of Southern Company;

WHEREAS, as a result of that acquisition, Plaintiff is no longer a PowerSecure shareholder and, thus, no longer has standing to maintain derivative claims on PowerSecure’s behalf. *See, e.g., Lewis v. Ward*, 852 A.2d 896, 901 (Del. 2004) (“[W]hen a merger eliminates a plaintiff’s

shareholder status in a company, it also eliminates her standing to pursue derivative claims on behalf of that company.”);

WHEREAS Plaintiff, through his counsel of record and pursuant to Rules 41(a) and 23.1(c) of the Federal Rules of Civil Procedure, thus hereby voluntarily dismisses the above-captioned action in its entirety without prejudice, with each party to bear his, her, or its own costs in connection with the litigation;

WHEREAS (i) there has been no settlement or compromise of the action; (ii) there has been no collusion among the parties; and (iii) neither Plaintiff nor his counsel has received or will receive directly or indirectly any consideration from Defendants for the dismissal;

WHEREAS Rule 23.1(c) of the Federal Rules of Civil Procedure provides that “[a] derivative action may be ... voluntarily dismissed ... only with the court’s approval,” and “[n]otice of a ... voluntary dismissal ... must be given to shareholders or members in the manner that the court orders”; and

WHEREAS the parties respectfully submit that notice should not be required here because former PowerSecure shareholders who otherwise may have been able to seek to intervene in this action do not have standing to maintain the derivative claims on PowerSecure’s behalf following the acquisition of the Company. *See Weiss v. SCM Corp.*, No. 85 Civ. 7569 (JFK), 1986 U.S. Dist. LEXIS 23035, at *3-*4 (S.D.N.Y. July 9, 1986) (holding that notice of voluntary dismissal due to loss of shareholder standing is not required because such a dismissal is not a “compromise or abandonment of any existing valid claim” (quoting *Daugherty v. Ball*, 43 F.R.D. 329, 335 (C.D. Cal. 1967)));

THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among the respective parties hereto, that:

1. The action is dismissed in its entirety without prejudice.
2. The parties shall bear their own fees and costs in connection with the action.

IT IS SO STIPULATED.

Dated: July 8, 2016

By: /s/ Shane P. Sanders

Craig W. Smith
csmith@robbinsarroyo.com
Gina Stassi
gstassi@robbinsarroyo.com
Shane P. Sanders
ssanders@robbinsarroyo.com
ROBBINS ARROYO LLP
600 B St., Suite 1900
San Diego, CA 92101
619-525-3990
Fax: 619-525-3991

By: /s/ E. D. Gaskins, Jr.

E. D. Gaskins, Jr.
ed@eghlaw.com
Jason Nolan Tuttle
jason@eghlaw.com
James M. Hash
james@eghlaw.com
EVERETT, GASKINS & HANCOCK, LLP
P. O. Box 911
220 Fayetteville St.
Raleigh, NC 27602-0911
919-755-0025
Fax: 919-755-0009

By: /s/ Nicholas Koluncich

Nicholas Koluncich
nkoluncich@newmexicoclassactions.com
THE LAW OFFICES OF NICHOLAS
KOLUNCICH III, LLC
6501 Americas Parkway NE - One Park Square
Suite 820
Albuquerque, NM 87110
505-881-2228
Fax: 505-881-4288

Attorneys for Plaintiff Irving Feldbaum

By: /s/ Barry M. Kaplan
Barry M. Kaplan
bkaplan@wsgr.com
Gregory L. Watts
gwatts@wsgr.com
WILSON SONSINI GOODRICH & ROSATI, PC
701 Fifth Ave., Suite 5100
Seattle, WA 98104
206-883-2538
Fax: 206-883-2699

By: /s/ Lee M. Whitman
Lee M. Whitman
lwhitman@wyrick.com
WYRICK ROBBINS YATES & PONTON, LLP
4101 Lake Boone Trail, Suite 300
P. O. Drawer 17803
Raleigh, NC 27607-7506
919-781-4000
Fax: 919-781-4865

Attorneys for Defendants Sidney Hinton, Christopher T. Hutter, W. Kent Geer, Thomas J. Madden, III, Kevin P. Collins, John A. Miller, A. Dale Jenkins, and Nominal Defendant PowerSecure International, Inc.

ORDER

It is so ORDERED.

Date _____

United States District Court Judge